1977

Kennecott Copper Corporation v. Salt Lake County : Brief of Respondent

Utah Supreme Court

R. Paul Van Dam; Bill Thomas Peters; Attorneys for Defendant-Appellant;
James B. Lee; Kent W. Winterholler; Attorneys for Plaintiff-Respondent;

IN THE SUPREME COURT OF THE STATE OF UTAH

KENNECOTT COPPER CORPORATION,

Plaintiff and Respondent,

-vs-

SALT LAKE COUNTY,

Defendant,

TABLE OF CONTENTS

AUTHORITIES CITED

Cases: Page

Statutes:

Other Authorities; Page

IN THE SUPREME COURT OF THE STATE OF UTAH

KENNECOTT COPPER CORPORATION, Plaintiff and Respondent, -vs- SALT LAKE COUNTY, Defendant and Appellant.	Case No. 15169

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

This is an action brought by Plaintiff-Respondent, Kennecott Copper Corporation, (hereinafter referred to as "Kennecott"), against Defendant-Appellant, Salt Lake County, (hereinafter referred to as "the County"), to recover those general ad valorem property taxes paid to the County by Kennecott under protest for tax year 1976.

DISPOSITION IN THE TRIAL COURT

Kennecott filed an alternative Motion for Judgment on the Pleadings or for Summary Judgment with regard to its First Cause of Action.

The County filed an alternative Motion for Judgment on the Pleadings or for Summary Judgment with regard to Kennecott's First and Second Causes of Action. The

Trial Court denied the County's Motions and took Kennecott's alternative Motion for Judgment on the Pleadings or for Summary Judgment under advisement. Kennecott and the County submitted to the Trial Court legal memoranda. The Trial Court thereafter issued its Memorandum Decision granting Kennecott a Partial Summary Judgment. The Trial Court ruled that the County, under the facts as presented, was without legal authority to reset its mill levy after that date prescribed by statute. In denying the County's Motion, the Trial Court also ruled that this Court's decision in Salt Lake City Corporation et al. v. Salt Lake County, Case No. 14776 decided October 7, 1977, an original action filed in this Court in which Kennecott was a petitioner and the County a defendant, was not res judicata upon this action.

RELIEF SOUGHT ON APPEAL

The County seeks reversal of the judgment of the Trial Court. Kennecott seeks to have this Court sustain the Trial Court's partial summary judgment as against the County.

STATEMENT OF FACTS

On August 9, 1976, the County Board of Commissioners set the general Salt Lake County property tax mill levy at 14.42 mills. (Record 2-3,20).

On September 20, 1976, the County Board of Commissioners attempted to reset that mill levy of August 9, 1976 from 14.42 mills to 16 mills. (Record 3,20).

On November 30, 1976 Kennecott paid the County those taxes assessed against Kennecott's real and personal taxable property for the tax year 1976. (Record 2-3,20). Concurrently with the payment on November 30, 1976 by Kennecott to the County, Kennecott also submitted to appropriate officials of the County a letter protesting the payment of certain portions of the general Salt Lake County property tax assessment levied against Kennecott for tax year 1976. (Record 3, 8-11, 20). In said letter of protest Kennecott specifically protested Three Hundred Ten Thousand Fifty-Two Dollars and Sixty-Eight Cents ($310,052.68) of that amount paid to Salt Lake County for taxes during tax year 1976. (Record 8). This amount paid under protest represented 1.58 mills of the mill levy assessed against Kennecott by the County pursuant to the general Salt Lake County property tax. Kennecott took the position in said protest letter that 1.58 mills of the 16 mill general Salt Lake County property tax levied by Salt Lake County on September 20, 1976 was illegal, having been attempted to be effectuated by the County following that date when Utah statutes require the County to set its general property tax mill levy.

(Record 8). Thereafter, on December 7, 1976 Kennecott filed in the Third Judicial District Court of Salt Lake County a Complaint against the County seeking refund of the amount paid under protest. (Record 2-6).

The County thereafter filed an Answer admitting the allegations of Paragraph 8 of the Complaint.

Paragraph 8 of Kennecott's Complaint alleges as follows:

> On September 20, 1976 the Salt Lake County Board of County Commissioners attempted to reset the 1976 Salt Lake County General Property Tax mill levy to 16 mills from that adopted on August 9, 1976 of 14.42 mills. (Record 3).

The County admitted the allegations of Kennecott in Paragraph 8 of the Complaint as follows:

> Answering Paragraph 8 of Plaintiff's Complaint, Defendant admits that it did reset the 1976 General Salt Lake County Property Tax mill levy at 16 mills on September 20, 1976, but denies each and every further allegation contained therein. (Record 20).

Based upon the County's foregoing admission, Kennecott moved the Trial Court, on February 3, 1977, for Judgment on the Pleadings or in the Alternative for Summary Judgment. (Record 25-28).

On February 17, 1977, the County moved the Trial Court for Judgment on the Pleadings or in the Alternative for Summary Judgment. (Record 33-37). The County's Motion stated in part:

> The general thrust of Plaintiff's entire Complaint, including Plaintiff's First and Second Cause of Action and Plaintiff's prayer for relief is the same or substantially similar to the allegations and relief made and sought by the Plaintiff, Kennecott Copper Corporation, in its Petition for Extra-ordinary Relief.
>
> 2. Attached to this pleading is a certified copy of the Court's decision in Case No. 14776 in which Kennecott Copper Corporation, the Plaintiff herein, was one of the Petitioners. In that Court's opinion, the identical issues presented by Plaintiff's Complaint in the instant action were passed upon and the Court in that case denied the Petition for Relief. Defendant asserts that the decision of the Utah Supreme Court in that case is binding upon Plaintiff in the instant action and the issues raised in that case are the same issues as are presently before this Court and have already been adjudicated by the Supreme Court of the State of Utah and are therefore res judicata as against the Plaintiff. (Record 36).

On March 1, 1977, the Trial Court heard argument from both parties with respect to Kennecott's Motion for Judgment on the Pleadings or for Summary Judgment, and the County's Motion for Judgment on the Pleadings or for Summary Judgment. (Record 30,31). At that time the Trial Court denied the County's Motion for Judgment on the Pleadings or in the Alternative Summary Judgment and took Kennecott's Motion under advisement. Thereafter, both Kennecott and the County submitted legal memoranda to the Trial Court with respect to Kennecott's

Motion for Judgment on the Pleadings or in the Alternative Summary Judgment. (Record 50-62 and 63-72).

On April 4, 1977, the Trial Court issued a Memorandum Decision in which it granted Kennecott's Motion for Summary Judgment. (Record 73-76). In the Trial Court's Memorandum Decision, Judge Conder reasoned and found as follows:

> In this case the Court finds that Salt Lake County, on August 9, 1976, set the mill levy for taxation at 14.42 mills. Thereafter, on September 20, 1976, the County by a new resolution changed the mill levy to 16 mills.
>
> The issue to be decided by the Court is whether or not the imposition of a mill levy of 16 mills, voted upon by the Salt Lake County Commission September 20, 1976, is lawful.
>
> Utah Code Annotated §59-9-6.3 requires the Board of County Commissioners of each county in the State of Utah levying an ad valorem property tax to fix the mill levy between the dates of the last Monday of July of each year, and the second Monday of August of each year. The applicable provision of §59-9-6.3 reads as follows:
>
> 'The Board of County Commissioners of each county must levy a tax on the taxable property of the county between the last Monday in the seventh month of each fiscal year, and the second Monday in the eighth month of each fiscal year, to provide funds for County purposes . . . '
>
> The provision of §17-36-1 of the Utah Code Annotated also Provides:
>
> 'On or before the second Monday in August of each year, the governing body shall levy a tax on the taxable real and personal property in the County . . . '

In addition to the sections already cited, the Court calls attention to §59-9-8 which provides for:

'The governing body of each city and town, and the said Board of County Commissioners, must file a statement with the State Tax Commission, on or before the second Monday in August of each year, showing the amount and the purpose of each levy fixed by such governing body and board.'

The Court finds that the words 'must' and 'shall' as set forth in the 59-9-6.3 and 17-36-1 are mandatory and not merely directory. Black's Law Dictionary in referring to the word 'must' says:

'This word, like the word 'shall' is primarily a mandatory affect. . . '

An examination of the same word in 'Words and Phrases' shows that generally speaking the use of the word 'must' is mandatory, not merely directory.

In view of the provisions of §59-9-8 it seems that the Utah Legislature has consistently held to the levy being fixed by the second Monday in August of each year. That provision has been in the Code since the laws of 1923. Section 59-9-6.3 was added to the law in 1961, and merely carries out the Legislative intent.

Defendants refer the Court to 59-11-7 which reads:

'No assessment, or act relating to assessment, or collection of taxes, is illegal on account of informality or because the same was not completed within the time required by law.'

The Court finds that there is a distinction between the assessment and the levy of the tax. McQuillen on Municipal Corporations, §44.92 states:

'Levy and assessment are distinct processes, and, except where otherwise provided by Statute, both are essential to taxation.'

The Code citation above referred to relates to the 'assessment', whereas the first citations refer to the 'levy' of the tax.

McQuillen on Municipal Corporations, Section 44.93 says: 'Whatever preliminaries are by law made essential and mandatory, as distinguished from directory merely, to the levy of a tax, must be observed or the tax will be void.'

The same authority at Section 44.95 states as follows: 'The time for making the levy is, in most jurisdictions, prescribed by statute or charter. Unless such provision is directory merely, the taxing authorities may not disregard a definite provision as to the time for the making of the levy, or as to when the amount of the tax is to be determined and certified. Generally, only one levy a year is authorized for the same purpose; but where no time is fixed for the levy the ordinance may be passed at any time within the year.'

'The applicable law governs as to the effective date of a levy, and as to the period covered thereby. It has been held that a municipality is authorized to levy taxes in anticipation of demands that will arise in the future. A levy of taxes by a city during the year of its incorporation generally is authorized.'

The Court recognizes the general rule on statutory construction of revenue legislation as set forth in Sutherland on Statutes and Statutory Construction, Section 6701. General Rule. 'While the power to tax, and the exercise of that power is indispensable to the effective operation of government, the rule has become firmly established that tax laws are to be strictly construed against the state and in favor of the taxpayer.

> Therefore, where there is reasonable doubt as to the meaning of a revenue statute it should be resolved in favor of those taxed.'
>
> For the foregoing reasons the Court grants the Plaintiff's Motion for Summary Judgment, and directs the Plaintiff to prepare an appropriate Order.

Partial Summary Judgment was entered by the Trial Court on April 14, 1977. (Record 77-80).

ARGUMENT

POINT I

THE TRIAL COURT CORRECTLY DENIED THE COUNTY'S MOTION FOR JUDGMENT ON THE PLEADINGS OR FOR SUMMARY JUDGMENT AS THE DECISION OF THIS COURT IN CASE NO. 14776 IS NOT RES JUDICATA WITH RESPECT TO THIS CASE.

In Point I of its brief the County asserts that the decision of this Court in Case No. 14776 is res judicata with respect to this appeal. A careful examination of Case No. 14776, Salt Lake City Corporation v. Salt Lake County, and of this case, as well as pertinent authority with respect to the doctrine of res judicata, reveals this position to be clearly erroneous.

Salt Lake City Corporation v. Salt Lake County, Utah Supreme Court Case No. 14776, was an original action by Kennecott and others in this Court seeking from this Court an extraordinary writ prohibiting the County from assessing, collecting or proceeding to assess and collect 1.58 mills of the general Salt Lake

County property tax mill levy. In that case this Court denied Kennecott and the other petitioners an extraordinary writ. This Court did not issue an opinion setting forth the grounds for the denial of that petition. Rather, denial of the petition for an extraordinary writ in Case No. 14776 was accomplished by this Court via a minute entry which reads in full as follows:

> Minute Entry - Case No. 14776, Salt Lake City Corp. v. Salt Lake County
>
> The petition for an extraordinary writ praying that respondents be: 1) prohibited from furnishing the services mentioned in section 17-34, Utah Code Annotated, 1953 as amended, until the provisions of that section having to do with a) taxing the property or b) charging a fee for such services, payable by persons benefited thereby in unincorporated areas, and should be prohibited for the reason that an increase in the mill tax levy was illegal as being statutorily (section 59-9-6.3, Utah Code Annotated, 1953 as amended) untimely and too late, is denied, and also it is ordered that any of the justices may make further or individual explanations in written opinions to be filed with the entry of this order or thereafter, by way of addenda thereto.
>
> Mr. Chief Justice Henroid dissented from such denial on the grounds it appears that such denial is: 1) contrary to this Court's decision in Salt Lake City v. Salt Lake County, 550 P.2d 1291, 1976, Case No. 14304, justifying the latter's reversal; and 2) is a departure from the clear wording of section 17-31-4, (supra.) (amounting to judicial legislation); and 3) sanctions county commissions to ignore the section by using general fund monies for an unauthorized purpose; and 4) there are no facts, and no precedent of this court, and no dispositive authority cited to justify

its conclusion that the existing mandatory statutory requirement that the tax levy "must" be accomplished on or before a stated date, can be construed to be a directory "may be accomplished interdiction."

Mr. Justice Crockett votes to deny the petition for these reasons: that the Court has always been reluctant to interfere with discretionary functions of other departments, including legislative and administrative bodies such as the County Commission, and will do so only under exigent circumstances; that the responsibility of setting the tax levy is reposed in the County Commission and generally the correction of inadvertances or errors herein is also within the Commission's prerogative; and this Court is asked to act in a great hurry to pass upon this controversy without a plenary basis for making such an adjudication.

An examination of the filings submitted in Salt Lake City Corp. v. Salt Lake County, Utah Supreme Court Case No. 14776, reveals that the above cited decision denying Kennecott and the other petitioners' petition and motion for an extraordinary writ may have been upon a number of grounds other than the merits of the case. Those grounds are as follows:

1. Kennecott and the other petitioners in Case No. 14776 had a plain, speedy and adequate remedy at law and were therefore, as per terms of Rule 65(b) of the Utah Rules of Civil Procedure, not entitled to an extraordinary writ prohibiting Salt Lake County from collecting 1.58 mills of the purported general property tax mill levy.

2. Utah Code Annotated §59-11-11, 1953 as amended, providing for the payment under protest of taxes and

suit for recovery thereafter, provides the exclusive method under Utah law for prohibiting taxing authority from collecting illegal taxes.

3. Utah Code Annotated §59-11-10, 1953 as amended, prohibits the courts of the State of Utah from enjoining the collection of any tax.

4. The action for an extraordinary writ by Kennecott and other petitioners in Case No. 14776 was not properly before the court in light of an appeal then pending before the Utah Supreme Court in Salt Lake City, et al v. Salt Lake County, Third Judicial District Civil No. 214675.

See the County's Motion in Opposition to Petitioner's Petition and Motion for an Extraordinary Writ in Salt Lake City Corp. v. Salt Lake County, Utah Supreme Court Case No. 14776, filed with this Court on October 1, 1976.

In order for a judgment and/or decision in one case to have res judicata effect upon a subsequent action, the judgment and/or decision in the earlier case must have been on the merits. See 50 CJS Judgments, §627 at p.51; 46 Am.Jur.2d, Judgments, §§477-478 at pp.640-643; and 21 ALR.3d, Judgment Granting or Denying Writ of Mandamus or Prohibition as Res Judicata, §2 at p.213. Whenever there is doubt as to whether or not a decision in one case is a decision on the merits so as to have res judicata effect upon a subsequent action, the first decision cannot be considered to have been on the merits.

This rule is well stated in 21 ALR.3d, Judgment Granting or Denying a Writ of Mandamus or Prohibition as Res Judicata, §12 at page 248 as follows:

> In a number of cases the courts have held or recognized the rule to the effect that a judgment denying a writ of mandamus without written opinion is not res judicata unless the sole possible ground of the denial was that the court acted on the merits or unless it affirmatively appears that such denial was intended to be on the merits.

Again, at 21 ALR.3d, Judgment Granting or Denying a Writ of Mandamus or Prohibition as Res Judicata, §18 at p. 256, it is stated as follows:

> In a number of cases the courts have held or recognized the rule to the effect that a judgment denying a writ of prohibition without written opinion is not res judicata unless the sole possible ground of the denial was that the court acted on the merits or unless it affirmatively appears that such denial was intended to be on the merits.

The above stated rule has been distinctly and succinctly stated by a California Court of Appeals in Stearns v. Los Angeles City School District, 244 Cal.App.2d 696, 53 Cal.Rptr. 482, 21 ALR.3d 164 (1966) as follows:

> The last action dictates that preliminary inquiry be directed to the question of whether the denial of the petition for a writ of prohibition is res judicata of the issues presented therein, and thereby precludes further consideration of the question which the districts seek to have reviewed herein. The subject was recently reviewed by this Court with the following conclusion: 'Accordingly, the rule is well settled that a denial by the Supreme Court or

the Appellate Court of an application for a writ without opinion, is not res judicata of the legal issues presented by the application unless the sole possible ground of the denial was that the court acted on the merits, or unless it affirmatively appears that such denial was intended to be on the merits. [citations deleted]

Respondents seek to come within the 'sole possible ground' emphasized in the foregoing quotation. Examination of the cases cited reflects no situation where the exception was applied. In McDonough v. Garrison, where the emphasized words first occur, the following appears: 'At the threshhold of this appeal we are met by the contention that, inasmuch as the precise jurisdictional points now urged for a reversal of the judgment were urged on the unsuccessful petitions for prohibition, and inasmuch as the only points briefed on those procedings were the jurisdictional questions, denials of such petitions must have been on the merits, and therefore such denials without opinion are res judicata and constitute binding determinations that the trial court had jurisdiction to proceed as it did.' [citations deleted] The majority opinion, which withstood a petition for hearing in the Supreme Court, rejected the view, expressed in the dissent, that the prior denial of a writ by the District Court of Appeal, and denials of rehearing of that ruling, and of an original application for a writ by the Supreme Court, were res judicata of the issue presented. It stated the rule as set forth in the above quotation and found two reasons why the petition might have been denied which are also pertinent here: First, 'the various writs could have been denied because the courts involved felt that, although there was an apparent excess of jurisdiction, an appeal from the final judgment was a plain, speedy and adequate remedy. It is elementary law that even though a trial court is acting in excess of its jurisdiction, an Appellate Court may, in its discretion,

> refuse to interfere by prohibition if the same questions may be passed on by an appeal after judgment, and if, in the opinion of the Appellate Court such remedy is plain, speedy and adequate.' [citation deleted]; and, secondly, 'the lower court had ordered a trial de nova before a jury. That order was not final. It was no more final than an order on a demurrer prior to entry of judgment is final. The trial court could have changed its order at any time before trial. When the petitions for writs of prohibition were filed the appellate courts may have denied them because they felt that the trial court would correct its error and not enter a final order in excess of its jurisdiction. The possibility that this may have been the basis of the denials prohibits such denials from becoming res judicata on the merits.' [citations deleted].
>
> Id., 21 ALR.3d 164, 172-74. [Emphasis added]. See also Collins v. City and County of San Francisco, 112 Cal.App.2d 719, 247 P.2d 362, 365-366, (1952); McDonough v. Garrison, 68 Cal.App.2d 318, 156 P.2d 983, 987-89 (1945); Kaufman v. Pima Junior College, 16 Ariz.App. 152, 492 P.2d 32, 34-35 (1971); Griffith v. Stout Remodeling, Inc., 219 Kan. 408, 548 P.2d 1238, 1243-44 (1976); and Hagan v. Superior Court of Los Angeles County, 57 Cal.2d 797, 22 Cal.Rptr. 206, 371 P.2d 982, 984 (1962).

The decision of this court in Salt Lake City Corp. et al v. Salt Lake County, Case No. 14776, does not affirmatively appear to be on the merits. Additionally, the sole possible ground of that decision, (Salt Lake City Corp. et al v. Salt Lake County, Utah Supreme Court Case No. 14776), as has been pointed out, supra, is not the merits of whether or not Salt Lake County may enact a taxing statute after the statutory deadline and have

such be effective. Therefore, clearly, according to the authorities above-cited, that case is not res judicata upon this action and the trial court was correct in its denial of the County's Motion for Judgment on the Pleadings, or for Summary Judgment.

POINT II

THE COUNTY IS REQUIRED TO SET ITS MILL LEVY BY THE SECOND MONDAY IN AUGUST OF EACH YEAR AND THE TRIAL COURT WAS CORRECT IN HOLDING THAT THE SETTING BY THE COUNTY ON SEPTEMBER 20, 1976 WAS UNLAWFUL.

In its Memorandum Decision granting Kennecott partial summary judgment, the Trial Court found as follows:

> In this case the court finds that Salt Lake County, on August 9, 1976, set the mill levy for taxation at 14.42 mills. Thereafter, on September 20, 1976, the county by a new resolution changed the mill levy to 16 mills.

This finding is based upon the admissions by the County in its Answer.

Utah statutes require the County to set its mill levy by the second Monday in August of each year. The Utah Legislature has in three separate statutory provisions stated and reiterated this requirement. Those statutory provisons read in pertinent part as follows:

> The Board of County Commissioners of each county must levy a tax on the taxable property of the county between the last Monday in the seventh month of

> each fiscal year and the second Monday in the eighth month of each fiscal year . . .
>
> Utah Code Annotated, §59-9-6.3, 1953 as amended, [Emphasis added].
>
> On or before the second Monday in August of each year, the governing body shall levy a tax on the taxable real and personal property within the county.
>
> Utah Code Annotated, §17-36-31, 1953 as amended, [Emphasis added].
>
> The governing body of each city and town, and each Board of County Commissioners, must file a statement with the State Tax Commission, on or before the second Monday in August of each year, showing the amount and purpose of each levy fixed by such governing body and Board.
>
> Utah Code Annotated, §59-9-8, 1953 as amended, [Emphasis added].

There is no question that the county possesses no power to levy any tax outside that conferred upon it by the Utah Legislature. This rule has been well stated by one authority as follows:

> The taxing power of the state is exclusively a legislative function, and taxes can be imposed only in pursuance of legislative authority, although the general charge, control, and conduct of taxation are an executive function. In other words, the power to tax must be drawn from express statutory authority, there being no such thing as taxation by implication, and the legislative authority must be positive and not negative in nature. All doubts will be resolved against the taxing power . . . . The Legislature alone has the right and discretion to determine all questions of time, method, nature, purpose and extent in respect of the imposition of taxes, subjects

> on which the power may be exercised, and all the incidents pertaining to taxation from beginning to end . . . .
>
> 84 CJS Taxation, §7, pp 51-56, [Emphasis added]. See also Certain Lots Upon Which Taxes are Delinquent v. Monticello, 159 Fla. 134, 31 So.2d 905, 909 (1947).

This above-stated rule has been forcefully explicated by the Washington Supreme Court in State ex rel Tacoma School District v. Kelly, 176 Wash. 689, 30 P.2d 638, 639 (1934), as follows:

> It is elementary that the power of taxation, subject to constitutional limitations, rests solely in the legislature. Municipal corporations have no inherent power to levy taxes. Their powers are derived through legislative grant, and are strictly construed. No implications are indulged in to expand the powers granted.
>
> [Emphasis added].

In summary, the County has no inherent power to tax; its power is derived solely from those legislative grants given it by the Utah Legislature. Therefore, the levying of any tax by the County must be accomplished in conformity with the relevant state statutes.

The Utah Legislature has declared that the County must and shall set its tax levy by the second Monday in August of each year. See Utah Code Annotated §§59-9-6.3, 59-9-8, and 17-36-31, supra. The use of these words, "must" and "shall," in the relevant statutory provisions impose upon the County a mandatory duty to set its tax levy by the second Monday in August. This construction

of the words "must" and "shall" as being mandatory has been stated by one court as follows:

> The word 'mandatory' has been used synonomously with 'indispensable' [Citation deleted]. A mandatory provision is one the omission to follow which renders the proceeding to which it relates illegal and void, while a directory provision is one the observance of which is not necessary to the validity of the proceedings. [Citation deleted].
>
> Whether a statute is mandatory or directory does not depend upon its form, but upon the intention of the Legislature, to be ascertained from a consideration of the entire act - its nature, its character, its reason, its object, and its subject matter, as well as the language used. [Citation deleted].
>
> But the use of the word, 'shall', is usually interpreted to make the provision in which it is contained mandatory, especially if it is frequently repeated. [Citation deleted].

The court continued:

> [Shall] is defined as follows:
>
> In common, or ordinary parlance, and in its ordinary signification, the term 'shall' is a word of command, and one which has always, or which must be given a compulsory meaning; as denoting obligation. It has a preemptory meaning, and it is generally imperative or mandatory. It has the invariable significance of excluding the idea of discretion, and has the significance of operating to impose a duty which may be enforced,
> . . . .
>
> Woodmansee v. Cockerill, 174 Ohio St. 11, 185 N.E.2d 439, 443 (Ohio App. 1961). [Emphasis added]

This Court has, on numerous occasions, recognized that the terms "shall" and "must" as utilized in statutes impose a mandatory duty. See State v. Zeimer, 10 Utah 2d 45, 48, 347 P.2d 1111, 1113 (1960), wherein this Court held that the use of the term "shall" in a criminal statute made compliance with the statute mandatory; and Glenn v. Ferrell, 5 Utah 2d 439, 304 P.2d 380 (1956) in which this Court held the use of the word "must" to impose a mandatory duty.

This Court has explicitly recognized that use of the words "shall" and "must" in a statute impose upon relevant authority mandatory duties. In Cottonwood City Electors v. Salt Lake County, 28 Utah 2d 121, 499 P.2d 270 (1972) this Court, in ruling that a particular statute did not impose a mandatory duty, stated:

> It seems to us that if the Legislature had intended that the County Commission should have no discretion, . . . it could have simply [used the words] 'shall' or 'must' . . . .
>
> Id., 28 Utah 2d at 123, 499 P.2d at 272.

It is thus patently clear that use by the Utah Legislature of the terms "shall" and "must" in those statutes pertaining to the date upon which the County must set its mill levy imposes upon the County a mandatory duty to set said mill levy by that date so stated.

That the terms "shall" and "must" are required to be construed as imposing a mandatory duty upon the

county when imposing taxes becomes even more clear in light of the rule that taxing statutes are to be strictly construed against the taxing authority and in favor of the taxpayer. This rule was succinctly stated by the United States Supreme Court in Gould v. Gould, 245 U.S. 151, 153, 62 L.Ed. 211, 213, 38 S.Ct. 53 (1917) as follows:

> In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the government, and in favor of the citizen.
>
> [Emphasis added].

The above-stated rule has been specifically recognized and enunciated as being the law in the State of Utah by this Court. In Utah Farm Bureau Insurance Co. v. State Tax Commission, 9 Utah 2d 421, 426, 347 P.2d 179, 182 (1959), this Court stated as follows:

> In harmony with the above is the well recognized rule that in case of ambiguity, uncertainty or doubt, taxing statutes are construed liberally in favor of the taxpayer and strictly against the taxing authority.
>
> See also Pacific Intermountain Express Co. v. State Tax Commission, 8 Utah 2d 144, 329 P.2d 650 (1958); and Ogden Union Railway and Depot Company v. State Tax Commission, 16 Utah 2d 23, 395 P.2d 57 (1964).

Thus, if there is any doubt whatsoever that the meaning of the words "must" and "shall" as utilized by the Utah Legislature in Utah Code Annotated §§59-9-6.3, 59-9-8, and 17-36-31, supra, have a directory or mandatory meaning, they are to be constructed as mandatory.[1]

Furthermore, it is a well settled rule that if taxes are not levied as per statutory directive those taxes cannot be imposed. This rule has been stated by one authority as follows:

> The time for making the levy is, in most jurisdictions, prescribed by statute or charter. Unless such provision is directory merely, the taxing authorities may not disregard a definite provision as to the time for making of the levy . . . .
>
> 16 McQuillan, Municipal Corporations, §44.95 at p.270, [Emphasis added]

The Florida Supreme Court has directly dealt with the issue of whether or not a tax imposed after a statutory deadline is legal and lawful. In Headley v. State ex rel Walker, 51 So. 2d 37 (Fla. 1951) the City of

---

[1] See also 16 McQuillan, Municipal Corporations, §44.13, pp. 40-41 and 3 Sutherland, Statutory Construction, §66.01, p. 179, (D. Sans Ed., 4th Ed. 1974), wherein it is stated:

> [I]t is a settled rule that tax laws are to be strictly construed against the state and in favor of the taxpayer. When there is reasonable doubt as to the meaning of a revenue statute, the doubt is to be resolved in favor of those taxed. This has been called a 'fundamental precept'.

Miami had during July prepared its budget, part of which was based on the amounts anticipated to be receivable based upon business license fees. Walker was assessed a license fee of $73.80 which he paid. The statute in question required the city to pass its appropriations not later than August 1 in any given year. On September 7, the city enacted an ordinance which raised the amount on occupational licenses to $280.00. Walker was arrested for not paying the newly imposed occupational tax. The Florida Supreme Court held that the city could not impose a higher tax for the year in question, stating as follows:

> If the City of Miami under the guise of an emergency ordinance, has the power to levy an additional occupational tax against the petitioner's business after the general appropriation ordinance was enacted and the prescribed amount promptly paid, then what limitation of power, if any, would preclude the enactment of other and additional ordinances within the fiscal year? Such unrestrained taxing power by the city could destroy petitioner-appellee's dry cleaning business. The power of the city to further tax the dry cleaning business was exhausted when the appropriation ordinance was enacted. . . .
>
> Id., 51 So.2d at p.39.

This precise issue was also addressed by the Illinois Supreme Court in People ex rel Ward v. Chicago & E. I. Ry. Co., 365 Illinois 202, 6 N.E.2d 119 (1936). In that case the local Board of Supervisors held a meeting on December 12, 1934, in which they levied the county tax.

The specific statutory provision in question required the Board of Supervisors to hold an annual meeting on the second Tuesday of September at which the amount of tax to be raised was to be determined. The question presented was whether the Board of Supervisors had, on December 12th, the jurisdiction to levy the challenged tax. The Illinois Supreme Court held as follows:

> It requires no citation of authorities to sustain the statement that the power to tax is one laden with great responsibilities and the exercise of such power should be strictly construed. Where the statute fixes a period within which or a day on which the tax is to be levied, time is of the essence of the power to levy and the command of the statute in that respect is mandatory.
>
> Id., 6 N.E.2d at 121 [Emphasis added].

The County levied 1.58 mills of its general property tax after that date prescribed by Utah statute for such levy. Therefore, that levy is null, void, and of no force and effect and the Trial Court was correct in granting Kennecott's Motion for Partial Summary Judgment with respect to its First Cause of Action.

POINT III

UTAH CODE ANNOTATED SECTION 59-11-7, 1953 AS AMENDED, DOES NOT APPLY TO THE LEVY OF A TAX AND DOES NOT CURE THE COUNTY'S DEFECTIVE SEPTEMBER 20, 1976 TAX LEVY.

The County contends that Utah Code Annotated §59-11-7, 1953 as amended, is a general provision which cures any

irregularities accomplished by the County in the levying of its tax on September 20, 1976. As Kennecott will show hereinbelow, that position is in error.

Utah Code Annotated §59-11-7, 1953 as amended, reads in full as follows:

> No assessment or act relating to assessment or collection of taxes is illegal on account of informality or because the same was not completed within the time required by law.

The above-cited Utah statutory provision, by its own terms, applies only to the assessment or collection of taxes, and not to the levying of a tax. The County's action which is here challenged by Kennecott is the attempted levy of a general ad valorem property tax by the County on September 20, 1976, a date later than that prescribed for any such levy by the Utah Legislature. The levy of a tax by any taxing authority is not the assessment or collection, or an act relating to the assessment or collection, of taxes and hence the statute above relied upon by the County is inapplicable and has no curative effect in this situation.

Those statutes relating to the assessment, levy and collection of taxes in Title 59, Utah Code Annnotated, 1953 as amended, treat such as follows:

(1) Assessment of Taxes; Title 59, Chapter 5.

(2) Levies; Title 59, Chapter 9.

(3) Collection of Taxes; Title 59, Chapter 10.

In 16 McQuillan, Municipal Corporations, §44.92 pp. 264-65, the distinction between the levy, collection and assessment of a tax is clearly pointed out as follows:

> [A] succinct definition of a tax levy is that it 'is the formal vote or action of the body authorized to make the levy.' It has been defined as 'the formal and official action of a legislative body determining and declaring that a tax of a certain amount, or of a certain percentage on value, shall be imposed on persons and properties subject thereto.' To levy a tax is to determine by vote the amount of taxes to be raised. . . .
>
> Levy by the proper Legislative authority has been declared to be the first step in taxation and to be an essential jurisdictional step, and consistent with this pronouncement, no tax can be assessed or collected unless and until a levy is ordered by the proper authority.
>
> Levy and assessment are distinct processes, and, except where otherwise provided by statute, both are essential to taxation.
>
> [Emphasis added].

This rule, supra, was well stated in Breckenridge v. County School Board, 146 Va. 1, 5, 135 S.E. 693, 695 (1926), as follows:

> There is a marked difference between making a levy and the assessment of property for the purpose of taxation. A levy is merely fixing the subject and the amount on which the property is to be taxed. An assessment consists of listing the property and putting a value thereon to which the rate fixed by the levy is to be applied.

Furthermore, as was stated by the Nebraska Supreme Court in Lynch v. Howell, 165 Nebraska 525, 86 N.W.2d 364, 365-66 (1957), as follows:

> The purpose of an assessment is to determine the ownership, quantity, and value of property for tax purposes as of the date fixed by statute, ... It involves no question of the power to tax . . . . [Citation deleted]. The property is taxed by the city when the city levies the tax.
>
> . . . .
>
> An assessment is an official listing of owners and quantities of property with an estimate of the value of the property of each for the purpose of taxation on a day fixed by the Legislature . . . . [Citation deleted]. The assessment of property does not involve the power to tax. The question of the power to tax arises at the time the levy of the tax is made.
>
> [Emphasis added].

Additionally, as has been stated by the Oregon Supreme Court in Oregon Worsted Company v. Chambers, 217 Ore. 104, 342 P.2d 108, 114 (1959):

> The levy of a tax by the tax levying body and the process of its assessment and collection are separate and distinct functions in the total process of taxation.

And finally, as has been stated by the Washington Supreme Court in Carkonen v. Williams, 76 Wash. 2d 617, 458 P.2d 280, 286 (1969):

> The word 'levy' when used in connection with the authority to tax, while assuming other meanings through interchangeable or indiscriminate usage, strictly speaking

> denotes the exercise of a legislative function, whether state or local, which determines that a tax shall be imposed, and fixes the amount, purpose, and subject of the action.

Thus, to "levy" a tax is to declare that tax, fix the amount of same and ascertain what is to be taxed. "Assessment" is to determine the value of what is to be taxed to which a levy is to apply. "Collection" is the process of crediting to the taxing authority those revenues derived by applying a levy to an assessment.

Utah Code Annotated §59-11-7, supra, addresses itself to the collection and assessment of taxes, but not to the levy of same. If the Utah Legislature had intended that statute's provisions to apply to the levy of taxes, it could have easily so stated.

Utah Code Annotated §59-11-7, does not cure an improper levy of a tax. Therefore, in light of the principles above stated that the "power to tax must be drawn from express statutory authority", emphasis added, that there is no such thing as taxation by implication", and that "[a]ll doubts must be resolved against the taxing authority," and because the Legislature did not expressly declare the curative effects of Utah Code Annotated §59-11-7, supra, to apply to "levies" its provisions do not cure the County's defective levy.

CONCLUSION

As has been clearly shown from the foregoing the ad valorem general property tax mill levy by the County on September 20, 1976 of 16 mills is illegal and uncollectible. Only the general property tax mill levy by the County accomplished on August 9, 1976 of 14.42 mills is valid and collectible and the Trial Court was correct and should be sustained in its granting to Kennecott Partial Summary Judgment in this action.

RESPECTFULLY SUBMITTED this 9th day of September, 1977.

James B. Lee
JAMES B. LEE

Kent W. Winterholler
KENT W. WINTERHOLLER

of and for
PARSONS, BEHLE & LATIMER
Attorneys for
Plaintiff-Respondent
79 South State Street
Salt Lake City, Utah 84111
Telephone No. (801) 532-1234

CERTIFICATE OF DELIVERY

I hereby certify that I personally delivered two (2) true and accurate copies of the foregoing BRIEF OF PLAINTIFF-RESPONDENT to R. Paul Van Dam, Salt Lake County Attorney, City & County Building, Salt Lake City, Utah 84111; and to Bill Thomas Peters, Special Deputy Salt Lake County Attorney, 400 Chancellor Building, 220 South 200 East, Salt Lake City, Utah 84111; this ____ day of September, 1977.

_____